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No. 03-1334

In the Supreme Court of the United States

IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT, PETITIONER

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding arbitrary and capricious the finding of the Environmental Protection Agency (EPA) that the State of California had established that the Imperial Valley Planning Area's nonattainment of the national ambient air quality standards for particulate matter of 10 microns or less by the applicable attainment date under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, was due to emissions from sources in Mexico.

2. Whether the court of appeals erred in remanding EPA's finding to the Agency with instructions that the Imperial Valley Planning Area be reclassified from a moderate to a serious nonattainment area.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 346 F.3d 955, and the amendment to the opinion (Pet. App. 17a-19a) is reported at 352 F.3d 1186.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2003, and amended on December 18, 2003. A petition for rehearing was denied on December 18, 2003 (Pet. App. 17a-19a). The petition for a writ of certiorari was filed on March 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of a decision of the court of appeals arising from rulemaking under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, by the United States Environmental Protection Agency (EPA). EPA promulgated a rule pursuant to CAA Section 179B(d), 42 U.S.C. 7509a(d), in which the agency found that California had established to EPA's satisfaction that, but for wind-borne emissions of particulate matter of 10 microns or less (PM-10) emanating from the bordering nation of Mexico, the Imperial Valley Planning Area (Imperial County) would have attained CAA standards for PM-10 by the applicable attainment date. Pet. App. 65a-91a. As a result of that determination, Imperial County was not subject to a finding that it had failed to attain the PM-10 standards and thus was not reclassified from a "moderate" to a "serious" non-attainment area under CAA Section 188(b)(2), 42 U.S.C. 7513(b)(2). Pet. App. 65a.

The Sierra Club petitioned for review, challenging EPA's rule, and the court of appeals granted the petition and remanded with instructions that EPA reclassify Imperial County from a moderate to a serious nonattainment area. Pet. App. 1a-16a. Petitioner Imperial County Air Pollution Control District petitioned for rehearing and moved to stay the mandate pending filing of the petition herein. *Id.* at 18a-19a.[1] The court of appeals denied rehearing but granted the stay. *Ibid.*

1. The CAA establishes a comprehensive program for controlling and improving the nation's air quality through

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[1] Petitioner is the local governmental agency charged with administering and enforcing the requirements of various air quality laws, including the CAA, in Imperial County. Pet. App. 3a. Petitioner was an intervenor-respondent below.

both state and federal regulation. Under the CAA, EPA is directed to set National Ambient Air Quality Standards (NAAQS) for air pollutants at levels requisite to protect public health and welfare. 42 U.S.C. 7408-7409. EPA promulgated NAAQS for various pollutants, including PM-10. See 40 C.F.R. Pt. 50. The PM-10 NAAQS relevant here requires that PM-10 in ambient air in a given area of the United States not exceed the regulatorily prescribed level for more than one day per year. 40 C.F.R. 50.6(a).

The States have primary responsibility for ensuring compliance with the NAAQS. 42 U.S.C. 7407(a). Once EPA promulgates a NAAQS, each State must formulate a state implementation plan (SIP) that provides for the attainment, maintenance, and enforcement of the NAAQS. 42 U.S.C. 7410(a). Each State's SIP is subject to EPA's review and approval. 42 U.S.C. 7410(a)(2).

EPA designated areas of the country as "attainment" or "nonattainment," based on whether each area satisfied the PM-10 NAAQS. 42 U.S.C. 7407(d). EPA is required to classify PM-10 nonattainment areas as "moderate" or "serious." 42 U.S.C. 7513. All PM-10 nonattainment areas were initially designated as "moderate" and were required to achieve attainment by December 31, 1994. 42 U.S.C. 7513(a) and (c). If attainment was not achieved by that date, then EPA was to reclassify the nonattainment area as "serious" and to require that the nonattainment area impose more stringent controls on sources of pollution and achieve attainment by December 31, 2001. 42 U.S.C. 7513 (b)-(c).

CAA Section 179B(d), 42 U.S.C. 7509a(d), provides an exception to reclassification. Under Section 179B(d), if a State establishes to EPA's satisfaction that a nonattainment area would have timely attained the PM-10 NAAQS "but for emissions emanating from outside the United

States," then the nonattainment area will not be reclassified from "moderate" to "serious." 42 U.S.C. 7509a(d); see 42 U.S.C. 7513(b)(2). In 1994, EPA issued administrative guidance (EPA Guidance) setting forth suggested information and methods for evaluating the impact on a PM-10 nonattainment area of emissions emanating from sources in a country bordering the United States.[2] Pet. App. 4a-5a.

2. Imperial County is located in southeastern California, and shares approximately 80 miles of border with Mexico. Pet. App. 2a-3a. The County was classified as a moderate PM-10 nonattainment area and was required to attain the NAAQS by December 31, 1994. *Id.* at 4a. During the period 1992-1994, the PM-10 standards were exceeded at various monitoring stations in the County on seven days. *Id.* at 26a. EPA, however, took no action to reclassify Imperial County. In 2000, respondent Sierra Club filed suit in the United States District Court for the

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[2] See *State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 59 Fed. Reg. 41,998 (1994).

The EPA Guidance identifies five examples of information and methodology that may be used: (1) monitoring PM-10 levels and wind speed and direction near the border, and correlating changes in PM-10 levels with changes in wind direction; (2) inventorying domestic PM-10 emissions in the nonattainment area's vicinity and demonstrating that those emissions did not cause exceedance of the PM-10 NAAQS; (3) analyzing ambient sample filters for specific types of particles emanating from the bordering country; (4) comparing inventories of PM-10 emission sources, and the relative magnitude of PM-10 emissions, for foreign and domestic sources; and (5) performing air dispersion or receptor modeling to quantify the relative impact of domestic and foreign sources of PM-10 on the nonattainment area. Pet. App. 5a-6a.

District of Columbia, seeking to compel EPA to reclassify the County as a serious nonattainment area. That suit was resolved by a consent decree, in which EPA agreed to make a reclassification determination for the County by October 9, 2001. *Id.* at 6a.

In August 2001, EPA issued a proposed rule that included two possible alternatives. Pet. App. 20a-64a. Under the first alternative, EPA proposed to find that California had established to EPA's satisfaction that, but for wind-borne emissions emanating from Mexico, Imperial County would have attained the PM-10 NAAQS by December 31, 1994, and therefore should not be reclassified. *Id.* at 24a-33a. Under the second alternative, EPA proposed to find that Imperial County failed to attain the NAAQS and should be reclassified. *Id.* at 33a-37a.

The first alternative, which EPA ultimately adopted in its final rule, was based on petitioner's July 2001 "Imperial County PM-10 Attainment Demonstration" (Attainment Demonstration). Pet. App. 24a. Consistent with the EPA Guidance, the Attainment Demonstration contained data from various sources, including PM-10 monitors located in Imperial County, spatial plots, wind roses, back trajectories, and a model based on an inventory of emissions sources in the County.[3] *Id.* at 26a-31a.

With respect to the PM-10 monitors, EPA proposed to conclude that, for five of the seven days that the PM-10 NAAQS was exceeded, "the analysis clearly supports the conclusion that but for the transport of emissions from

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[3] Spatial plots reflect the concentration of PM-10 measurements at various monitoring stations in a given area. Pet. App. 15a n.7. A windrose diagram shows the percentage of time that wind blows from each compass direction for various ranges of wind speed. *Id.* at 15a n.8. A back trajectory is a map that, by measuring wind speed and direction a certain distance above the ground, shows the most likely source of a given parcel of air that hits a monitor. *Id.* at 15a n.9.

Mexico, the PM-10 concentrations would not have exceeded the standard." Pet. App. 27a. The other two exceedances occurred on January 19 and 25, 1993, at the Brawley monitoring station twenty-one miles north of the County's border with Mexico. *Ibid.*[4] The proposed findings noted that "there are less data on which to base an analysis" for those two days. *Ibid.* Nonetheless, in light of the "magnitude of emissions in the City of Mexicali" just south of the border, the proposed finding concluded that "[t]he emissions from Mexico are likely to have contributed to the PM-10 concentration at the monitor, although it is difficult to precisely quantify the extent of the contribution." *Ibid.* See also *id.* at 54a ("[G]iven the number of hours with a southerly wind direction, and the closeness of the exceedance to the standard, it is likely that, but for transport from Mexico, [the January 19] exceedance would not have occurred."); *id.* at 55a (similar for January 25 exceedance).

The Sierra Club submitted adverse comments on the proposed rule, contending, *inter alia*, that California failed to show that Imperial County's exceedances of the PM-10 NAAQS on January 19 and 25, 1993, were caused by emissions from Mexico. See Pet. App. 75a-76a. EPA promulgated a final rule on October 19, 2001, finding that California had made the requisite showing under CAA Section 179B(d) and thus Imperial County would not be reclassified. *Id.* at 65a-91a.

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[4] Adjusting the two actual exceedances to account for days not sampled, 40 C.F.R. Pt. 50, App. K, established that the expected number of exceedances was 4.3 days per year, which is above the regulatory standard of one day per year and would ordinarily require reclassification as a serious nonattainment area. Pet. App. 11a; see 40 C.F.R. 50.6(a).

With respect to the PM-10 exceedances, the final rule concluded that "given the available information," the State's analysis "of spatial plots, wind roses, and back trajectories provides the best determination of PM-10 emissions transport from Mexico." Pet. App. 76a-77a. EPA recognized that one study—the "Imperial Valley/ Mexicali Cross Border PM-10 Transport Study"—had analyzed the air quality and wind direction and speed on the days on which the NAAQS had been exceeded, including January 19 and 25, 1993, and found the air stagnant on those days. *Id.* at 77a. But EPA concluded that "the State's demonstration uses more meteorological data and finds evidence that transport [of PM-10] from Mexico is likely even with the stagnant conditions at the surface." *Ibid.* Although EPA "concede[d] that informa-tion is not available to determine with confidence the exact quantity of PM-10 coming from Mexico," EPA found that "the State has diligently collected and analyzed available evidence and has successfully demonstrated for each of the exceedance days the probability that Imperial County would not have violated the NAAQS but for the emissions emanating from Mexico." *Id.* at 78a.

3. Pursuant to CAA Section 307(b)(1), 42 U.S.C. 7607(b)(1), the Sierra Club petitioned for review of EPA's final rule, raising the same challenges to EPA's decision as in its comments. Pet. App. 8a. The court of appeals granted the petition and remanded with instructions that Imperial County be reclassified as "serious." *Id.* at 14a.

The court of appeals recognized that where "a court reviews an agency action 'involving primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' we must 'defer to the informed discretion of the responsible federal agencies.' " Pet. App. 9a (quoting *Marsh* v. *Oregon Natural Res.*

Council, 490 U.S. 360, 377 (1989)). The court also concluded, however, that it "may not defer to an agency decision that 'is without substantial basis in fact.' " *Ibid.* (quoting *Federal Power Comm'n* v. *Florida Power & Light Co.*, 404 U.S. 453, 463 (1972)).

Having articulated those standards, the court inquired whether the record supported the conclusion that the exceedances of the PM-10 standard on January 19 and 25, 1993, at the Brawley monitors were caused by emissions from Mexico. The court concluded that the record showed that on the days PM-10 exceedances were recorded at the Brawley monitors, the winds in the County were blowing, not from Mexico, but from another direction. Pet. App. 12a-13a. The court found that "EPA's notion of what constitutes a southerly wind [*i.e.*, a wind from Mexico] is, at the least, expansive and, at most, positively incorrect." *Id.* at 12a. Moreover, the court found that even if there were a southerly component in the wind on those days, it would be "of the west-southwesterly variety and thus does not support [EPA's] theory of transport from Mexico." *Id.* at 13a. Finally, the court stated that, in its view, the record also showed that County monitoring stations located between the Brawley monitors and Mexico (and thus closer to Mexico), rather than showing similar exceedances, recorded much lower PM-10 levels than the Brawley monitors. *Id.* at 10a-11a.

Based on its review of the record, the court concluded that "there simply [was] no possibility that Mexican transport could have caused the observed PM-10 exceedances" on the two days. Pet. App. 13a. The court determined that, "[a]lthough the normal course of action when the record fails to support an agency's decision 'is to remand to the agency for additional investigation or explanation,' " *ibid.* (quoting *Florida Power & Light Co.* v.

Lorion, 470 U.S. 729, 744 (1985)), this was an "exceptional case" in which a remand with instructions was appropriate. The court stated that it "fail[ed] to see how further administrative proceedings would serve a useful purpose; the record here has been fully developed, and the conclusions that must follow from it are clear." *Id.* at 13a-14a. Accordingly, the court remanded with instructions "that the EPA classify Imperial Valley as a 'serious' nonattainment area." *Id.* at 14a.

ARGUMENT

The decision of the court of appeals, although incorrect, was primarily based on an analysis of the particular, highly technical facts of this case. It does not conflict with any decision of this Court or any other court of appeals, and it presents no issue of exceptional importance. Further review is therefore unwarranted.

1. The court of appeals' primary conclusion—that the record was insufficient to support EPA's conclusion that the January 19 and 25 exceedances were caused by transport of PM-10 emissions from Mexico—was mistaken. Because reliable PM-10 emissions data from Mexico were not available, EPA was not able precisely to quantify those emissions and track their exact course to monitors in Imperial County. Pet. App. 27a, 78a. Nonetheless, the city of Mexicali just south of the border is a very substantial source of PM-10, with emissions estimated to be equal to the total for all of Imperial County. *Id.* at 29a. In addition, EPA noted that the amount of the exceedances—162 micrograms per cubic meter on January 19 and 175 on January 25, as compared with the NAAQS of 150—were slight. Finally, EPA concluded in its initial analysis, which formed the basis for its final rule, see *id.* at 76a-78a, that there was some wind from a southerly direction on the two days. *Id.* at 53a, 54a.

EPA is entitled to substantial deference on highly technical factual issues of this sort. The statute expressly recognizes the need to grant EPA deference by requiring the State to make a showing only "to the satisfaction of the Administrator" that the NAAQS would have been satisfied absent "emissions emanating from outside the United States." 42 U.S.C. 7509a(d). Especially in light of that highly deferential standard, the court of appeals erred in overturning EPA's determination that the exceedances were caused by transport of PM-10 from Mexico.

2. Although the court of appeals erred in concluding that the record in this case was insufficient to support EPA's conclusion that emissions from Mexico caused the PM-10 exceedances on January 19 and 25, further review of that conclusion is not warranted. The court of appeals correctly identified the governing legal standard. The court noted that "where, as here, a court reviews an agency action 'involving primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' [the court] must 'defer to the informed discretion of the responsible federal agencies.' " Pet. App. 9a (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)); see *ibid.* (quoting *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council*, 462 U.S. 87, 103 (1983), for the proposition that "[w]hen examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential"). As the court of appeals recognized, however, if "the agency offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," then the court may correct the agency's "clear error of judgment." *Id.* at 10a (quoting *Motor*

Vehicle Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Because the court started from those correct legal premises governing the standard of review in cases of this sort, petitioner is mistaken in contending (Pet. 26) that "[a]llowing the decision below to stand would pose a grave threat to decades of jurisprudence founded on the basic principle of judicial respect for agency expertise." The decision of the court of appeals rests primarily on the court's conclusion that, "[b]ased on the data and the reports in the record, there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances on January 19 and January 25." Pet. App. 13a. Although that analysis of the facts is mistaken, the mistake is rooted in the highly technical factual record in this particular case, and the effect of the court's decision is likely to be similarly limited. Further review is therefore not warranted.

3. In addition to concluding that EPA had erred in concluding that the January 19 and 25 exceedances were caused by PM-10 emissions from Mexico, the court of appeals took the unusual step of remanding with instructions "that the EPA classify Imperial Valley as a 'serious' nonattainment area." Pet. App. 14a. That disposition was error. Nonetheless, because that error too is largely fact-based and limited to the particular situation present in this case, further review of the court's determination to remand with instructions is not warranted.

a. This Court has explained that "[i]f the record before the agency does not support the agency action, * * * the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Therefore, even if the court of appeals were correct

that EPA had erred in concluding that there was sufficient evidence of winds blowing from the direction of Mexico to support the conclusion that transport of PM-10 emissions from Mexico had caused the exceedances on January 19 and 25, the court of appeals should have remanded the case to EPA. In that way, the agency could have made the two vital remaining determinations in this case with the benefit of the court of appeals' conclusion that its analysis of the wind direction data had been mistaken. First, the agency could have determined whether the remaining data in the record were sufficient to support the State's conclusion that the emissions on January 19 and 25 had been caused by transport of PM-10 from Mexico. Second, the agency could have determined whether reopening the proceedings to allow for further development of the record was appropriate. Both of those determinations should have been made in the first instance by the agency and not by the court.

b. Although the court of appeals should have allowed the agency, in the first instance, to reevaluate its decision in view of the court's rejection of its initial determination, the court's error was again largely factual. If the court of appeals were correct that "there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedances on January 19 and 25," Pet. App. 13a, then the court's failure to allow the agency to re-examine the record in the first instance on remand would be of no significance. Indeed, petitioner's argument that the court of appeals' instruction on remand was erroneous is based on the premise (Pet. 30) that "the totality of record evidence * * * more than adequately supports EPA's expert decision that Mexican PM-10 emissions provided *at least* that small amount of influence necessary to cause the slight ex-ceedances observed." Further review is not

warranted to resolve the question whether petitioner or the court of appeals is correct about that premise.

Moreover, it is unlikely that a remand would have led the agency to reopen the proceedings in this case to permit further development of the facts. The parties had a full opportunity to develop the administrative record in this case, and the court of appeals' decision turned on particular historical events that occurred in January 1993, almost ten years before the court of appeals' decision. In those circumstances, it is doubtful that the agency would have found it useful to reopen the record to uncover new facts that could influence the outcome in this case. Petitioner itself does not identify any further useful data that likely could have been obtained through further investigation. For that reason as well, the court of appeals' failure to permit further development of the record in this case was of limited significance.

c. Petitioner contends (Pet. 28-29) that the court of appeals' decision conflicts with this Court's decision in *Immigration & Naturalization Service* v. *Ventura*, 537 U.S. 12 (2002) (*per curiam*). In that case, the court of appeals had reversed a determination of the Board of Immigration Appeals (BIA) that an alien did not qualify for political asylum because he had not faced persecution when he left his home country "on account of" a political opinion. *Id.* at 13. Having reached that conclusion, the court of appeals went on to decide an issue that the BIA had not reached—whether "conditions in [the home country] had improved to the point where no realistic threat of persecution currently existed." *Ibid.* The court of appeals held that the conditions had not so improved. This Court reversed, holding that because "[t]he BIA has not yet considered the 'changed circumstances' issue," the court of appeals "committed clear error" in making that deter-

mination itself in the first instance. *Id.* at 17. The court of appeals should have "giv[en] the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Ibid.*

The Court's holding in *Ventura* is inapplicable here. The issue the court of appeals decided in framing its remand—whether the record supported a conclusion that the two exceedances were caused by PM-10 transported from Mexico—was not one that EPA had not yet had the chance to address, as in *Ventura.* To the contrary, EPA had considered and ruled on that issue in the decision under review. Although, as argued above, the court of appeals erred in reversing EPA's determination on that issue, the court's error has little to do with the error identified in *Ventura.*[5]

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[5] The other two decisions of this Court cited by petitioner (Pet. 26 n.8) are also inapposite. In *Immigration & Naturalization Service* v. *Yi Quan Chen*, 537 U.S. 1016 (2002), the Court simply issued an order vacating and remanding the lower court's decision for further consideration in light of *Ventura.* In *Immigration & Naturalization Service* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), the Court held that the court of appeals erred in finding that a decision of the BIA was not "supported by reasonable, substantial, and probative evidence on the record considered as a whole" under 8 U.S.C. 1105a(a)(4) (1994) (repealed by Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C, Tit. III, § 306(b), 110 Stat. 3009-612). The Court's decision had nothing to do with the circumstances under which a court may remand a case to an agency with specific instructions after finding, as the court did here, that the agency had erred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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